

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 21, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2008AP1729-CR**

**Cir. Ct. No. 2003CF103**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRUCE W. HUML,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Rusk County:  
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bruce Huml appeals a judgment of conviction for theft by virtue of business, contrary to WIS. STAT. § 943.20(1)(b).<sup>1</sup> Huml argues there was insufficient evidence to support his conviction. We affirm.

### BACKGROUND

¶2 Huml entered into a logging agreement with Larry Krisik in June 2002. The agreement provided that Krisik would sell all the marketable popple<sup>2</sup> on his property to Huml, and Huml would pay Krisik by the cord. Huml then contacted Douglas Lebal, a logging contractor, who agreed to log the property and buy the timber. Lebal logged the property in January 2003, and sent Huml three checks totaling \$11,508.50. According to the agreement Huml had with Krisik, Huml then owed Krisik \$5,986.00.

¶3 Krisik testified he did not receive any money from Huml and when he attempted to call him he learned Huml's phone had been disconnected. He also sent Huml a letter demanding payment, but the letter was returned with the explanation that Huml was no longer at that address. Krisik contacted the Rusk County Sheriff's Department, and Huml was charged with theft.

¶4 At the close of the State's case in chief, Huml moved for a directed verdict. Huml argued his agreement with Krisik unconditionally transferred to him the right and title to the timber on Krisik's property. He asserted that he owed

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>2</sup> Popple is a common name for *populus tremuloides*, otherwise known as trembling aspen. Arthur Plotnick, *The Urban Tree Book: An Uncommon Field Guide for City and Town*, (New York: Three Rivers Press, 2000), 157.

Krisik under the terms of the agreement, but that he owned the timber. Accordingly, he contended their relationship was that of a debtor and a creditor, which he argued could not be the basis for the crime of theft by virtue of business.

¶5 The circuit court denied Huml’s motion, concluding the agreement did not unconditionally transfer ownership of the timber, and the State had made a prima facie case of theft by virtue of business. The trial proceeded, and the jury found Huml guilty.

### DISCUSSION

¶6 “[W]hen a verdict has been rendered by the jury and the sufficiency of the evidence to support the verdict is challenged, both trial and appellate courts apply the ‘any-credible-evidence’ standard.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 783, 541 N.W.2d 203 (Ct. App. 1995). Under this standard, we will sustain the verdict if there is any credible evidence to support it. See *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶7 On appeal, Huml concedes he failed to pay Krisik the money he owed him. However, he continues to make essentially the same argument he made in his motion for directed verdict: that his failure to pay Krisik was not a crime. He argues, “Although Huml was in possession of money that according to the timber contract he should have tendered to Krisik after he received money from the conversion of the timber, that is a civil matter and cannot be the basis of a criminal conviction.”

¶8 The only authority Huml cites to support this position is a statement from a 1935 case affirming the principle that “liabilities growing out of a debtor-creditor relationship cannot be made the basis of a charge of embezzlement.”

*Hanser v. State*, 217 Wis. 587, 592, 259 N.W. 418 (1935). This maxim, however, does not advance Huml’s argument.

¶9 It is true that “the establishment of a debtor-creditor relationship and nothing more would not be sufficient to establish a case under embezzlement,” *In re Neumann*, 13 B.R. 128, 132 (Bkrptcy. E.D. Wis., 1981). However, the State proved Huml’s conduct satisfied the elements of theft by virtue of business, i.e., embezzlement. The circuit court presented the elements as follows:

One, the defendant had possession of money belonging to another because [of] his business. Two, the defendant intentionally retained possession of the money without the owner’s consent and contrary to the defendant’s authority. ... Three, the defendant knew that retaining possession of the money was without the owner’s consent and contrary to the defendant’s authority. Four, the defendant intended to convert the money to his own use.

The jury subsequently found Huml had possession of Krisik’s money because of his business; Huml knew his possession was contrary to his authority and Krisik’s consent; and he intended to convert it to his own use.

¶10 Federal courts have also recognized a distinction between liabilities arising out of a debtor-creditor relationship and the crime of embezzlement. They have noted that funds a creditor loans a debtor are not embezzled because they belong to the debtor. See *In re Criswell*, 52 B.R. 184, 202 (Bkrptcy. E.D. Va., 1985). In other words, a debtor purchases the use of money and therefore owns the funds even though there is an obligation to repay the creditor. By contrast, “[e]mbezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted.” *Neumann*, 13 B.R. at 131 (citation omitted). Thus, a charge of embezzlement may arise when the party in possession of funds

holds them in trust for another and therefore is not privileged to use them as if they were his own.

¶11 Huml concedes he “was in possession of money that according to the timber contract he should have tendered to Krisik after he received money from the conversion of the timber.” Thus, it appears clear Huml knew he held a portion of the proceeds from the timber sale in trust for Krisik. His subsequent conversion of the funds to his own use therefore correctly gave rise to a charge of theft by virtue of business.

¶12 Krisik and Huml presented conflicting testimony about whether Huml paid Krisik. The jury concluded Huml’s assertion he paid Krisik was not credible. As the trier of fact, it was the jury’s task “to sift and winnow the credibility of the witnesses.” *State v. Curiel*, 227 Wis. 2d 389, 421, 597 N.W.2d 697 (1999). We therefore defer to the jury’s credibility determination. The jury determined that Huml lied about paying Krisik and thus Huml intended to convert the money to his own use. Because Huml concedes the remaining elements of the crime,<sup>3</sup> we discern no basis to disturb the jury’s verdict.

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<sup>3</sup> Huml reiterates the argument he made in his motion for a directed verdict that the contract unconditionally transferred the timber rights to him, and that he therefore could not have stolen what belonged to him. Even if that were true, Huml was not charged with timber theft, but with theft by business. A conviction for theft by business requires that (1) Huml had possession of, among other things, *money* belonging to another by virtue of his business, (2) this possession was contrary to Huml’s authority and Krisik’s consent, (3) Huml knew this, and (4) Huml intended to convert the money to his own use. Huml concedes the first three elements with his statement, “Huml was in possession of money that according to the timber contract he should have tendered to Krisik after he received money from the conversion of the timber.” Further, this statement also appears to negate Huml’s claim that he unconditionally owned the timber rights. It is difficult to discern why Huml would acknowledge he had a duty to compensate Krisik for the timber he took, while at the same time arguing he owned it unconditionally.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)5.

